CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1828.

Eastern Dist.
January, 1828

JOHNSTON vs. *BELL & AL.*

A sale by order of the court of probates does not extinguish the mortgage of the vendor of the deceased.

The vendee who does not give his vendor notice of the claim of a third person on the land, does not thereby lose his recourse.

APPEAL from the court of the fourth district.

MARTIN, J. delivered the opinion of the court. The plaintiff states that Seth Jones purchased from the defendants, a tract of land, which they had bought from Blake, and which the plaintiff, after the death of Seth Jones, purchased at the sale of his estate; that Blake having failed to pay the price of the land, his vendors had it seized in the hands of the plaintiff. It was accordingly sold and he purchased it; that the plaintiff has an action against the defendants, the heirs of their ancestor's verdict to recover

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the price he paid for the land, deducting the balance paid back to the plaintiff, and the amount of the improvements, and they have transferred their claim to the plaintiff, and authorised him to sell in his own name, and to their use.

The answer urges, that the petition ought to be dismissed, because it does not show what persons are the heirs, in whose name the plaintiff sues. The general issue was pleaded, and the authority to sue in the name of the heirs denied. The defendants denied they had any notice of the claim of Blake's vendors, and averred they might have resisted it. They alleged that the sale of the court of probates extinguished the mortgage of Blake's vendors, and the purchase by the plaintiff was fraudulent and collusive.

He had judgment & the defendants appealed.

The appellee complains of error to his disadvantage, and prays that the judgment be amended by allowing him a greater sum in damages.

The alleged defect in the petition appears to have been obviated by a supplemental one, filed with leave of the court, in which the heirs are named.

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The statement of facts shows that the premises were sold, as stated in the petition, by Blake to the defendants, who sold to Seth Jones, at the sale of whose estate, the plaintiff purchased the premises. The land has been sold to satisfy the claim of Blake's vendors.

The authority of the plaintiff to sue in the name of the heirs is proven, and the judgment of the district court is for the sum paid by the plaintiff, with interest and costs.

It is true he neglected to give notice to the defendants of the claim of Blake's vendors. By doing so he did not lose his recourse, but left the defendants at liberty to show they could have refuted the claim. This they have not shown.

The plaintiff purchased by an apparent vendee; never was out of possession, and paid nothing but what Blake owed to his vendors, There is neither fraud nor collusion in this; but he is to be considered as the direct and immediate purchaser.

The sale of the court of probates could not extinguish the mortgage of Blake's vendors.

There has been no actual eviction. But the plaintiff has recovered a sum of money, by which recovery he is completely indemnified for this, and he has shown no other damage.

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Porter for the plaintiffs, *Morse* for the defendants.

GARDERE vs. FISK.

A purchaser at a sheriff's sale may avail himself of the incorrectness of the sheriff's declarations at the sale, or of the neglect of producing the parish judge's certificate, without having pleaded it.

Every interested party may demand the production of a paper in the hands of a third person, and is bound to do so, before he may offer evidence of its contents.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff prayed an injunction to prevent the sale of a slave he had purchased from the defendant's mortgage debtor, on a suggestion that the sum for which the mortgage was given had been paid.

The general issue was pleaded, the plaintiff had a verdict and judgment; the defendant made an unsuccessful attempt to obtain a new trial, and appealed.

His counsel relies on three bills of exceptions.

The first is to the refusal of the district court to allow him to file an amended or supplemental answer.

The next, to the introduction of parol evidence of the contents of a receipt given by him to his debtor.

The last, to the refusal to admit in evidence, a settlement between him and his debtor.

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1. The proferred answer denied that the slave seized was mortgaged for $700 only, as stated in the petition, but averred the mortgage was for $3000; that the sheriff's declaration at the time of sale, to the contrary, was untrue, and that he the sheriff, did not then produce the certificate of the parish judge.

The court refused leave to file the answer, deeming it unnecessary, and thinking that all the evidence, of which it would authorise the introduction, could be received under the general issue.

It does not appear to us that the mortgage for $3000 could be introduced without being set forth; nor that if any advantage could result to the defendant from proving the incorrectness of the allegations of the sheriff at the time of sale, or from his neglect to produce the parish judge's certificate, he could avail himself of them without giving notice of his intention to do so by plea.

2. The plaintiff's counsel contends that as the receipt, of the contents of which he was permitted to administer parol evidence, was not in his client's power, leave was correctly granted; that the rule is not that the best possible

evidence is required, but the best evidence in the party's power.

We think this reasoning illogical. Every interested party may demand the production of a paper in the power of a third party, generally speaking, by a *subpœne duces tecum*. In very few cases, indeed, special reasons may create an exception; and none is here alleged.

It is urged that the defendant and his debtor might collude and forge a new receipt. Collusion and forgery may defeat most men's right, but cannot afford protection unless proven.

3. The defendant was refused leave to read a settlement with his debtor, posterior in date to the sale to the plaintiff. By this settlement, an imputation of several payments theretofore made, was then made to other claims of the defendant, than that secured by the mortgage affecting the slave. This settlement was made at the foot or on the back of a detailed account of transactions between the parties.

The objection of the plaintiff was, that if no imputation was made of these payments by the debtor, at their respective dates, they were of course to be imputed on the mortgage debt which the debtor had the greatest interest to discharge, and the parties could not afterwards,

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when a third party had become interested, avert to his injury, the effect of the legal imputation, at the periods of these payments.

This would have been correct reasoning, (after the settlement of the detailed account had been read) to show that the imputations were incorrectly made. The account might then show that they were in accordance with the intentions of the parties, at the time of each respective payment; that the debts thus extinguished, were also mortgage debts, and continue in their exigibility to that to which the plaintiff contends the payments are to be applied, which might not then be payable.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; the verdict set aside, and the case remanded with directions to the judge to permit the defendant to file the proffered supplemental or amended answer; not to admit parol evidence of the contents of the receipt, while its absence be not properly accounted for; and to admit the settlement at the foot or back of which is an account of the transactions between him and his debtor, the plaintiff's vendor, or which is ac-

companied by such account; and it is ordered that the plaintiff and appellee pay costs in this court.

Ripley & Conrad for the defendant.

LAFONTA vs. POULTZ.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendants sold to the plaintiffs a note, purporting to be endorsed by Philipon without endorsing it; Philipon being sued by the plaintiff avowed that the signature on the back of the note was a forgery, thereupon the plaintiff cited the defendant, requiring him to contest Philipon's plea, and praying judgment against him in case it was supported.

The defendant pleaded that the plaintiffs action against him was premature, the general issue and collusion between the plaintiff and Philipon.

The district court dismissed the action against the defendant, being of opinion that two distinct and seperate causes of action were cumulated.

The jury gave a verdict in favor of Philipon.

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The plaintiff appealed from the judgment of the court, dismissing Poultz.

The cumulation of actions is the forming together several demands against the same defendant. It is clear from the phraseology of the *code practice*, *art.* 149–152, that the legislature understood it so. Here two demands are made against *two* distinct defendants—the bringing such demands together is no where forbidden—and by a strong analogy to the case of a vendee who resists a claim against the property sold, and calls in his vendor to contest the plaintiffs demand, and prays that in case the latter succeeds, he the vendee and defendant may have judgment against the person he brings in; the present action against the appellee is supported.

The appellee had sold to the appellant a paper, which although of no value appeared on its face to be valuable—it was literally nothing; the consideration of the sale is clearly recoverable on the establishment of the fact. The appellant took the best mode he could to recover the money from the endorser of the paper—this person averred it to be a forgery. The appellant, that he might not be charged with neglect, called on his vendor to resist the preten-

sions of the endorsers if they were unfounded, and prayed that if the endorser succeeded, he the plaintiff should have judgment against his vendee.

There is a close analogy between this case and that of vendee and warrantor—the same reasoning supports them both. A multiplicity of actions and delay are avoided by the mode referred to, and the best possible means is afforded to the party brought in, to establish the genuineness of the paper he sold—and it is very difficult to discover on what ground this mode of proceeding may be injurious to him.

It is therefore ordered, adjudged and decreed, that the judgment of the district court in favor of the appellee, be annulled, avoided and reversed, and the case remanded, with direction to the district court to proceed therein according to law, and it is ordered that the appellee pay cost in this court.

Seghers for the plaintiff, *Hennen & Morphy* for the defendant.

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DICKS & AL. vs. CHEW & AL.

The certificate of the notary who protested the note, is admissible in evidence, altho' it does not establish every fact necessary to establish the plaintiff's claim.

APPEAL from the court of the third district.

PORTER J. delivered the opinion of the court. This is an action against the maker and endorsers of a promissory note. To establish the liability of the latter, the plaintiffs offered on the trial the certificate of the notary who had protested the note for non-payment. It was written at the foot of the protest, which is of date the 21st of February, and is in the following words, "on the 22nd day of February, 1825, I the said notary gave advice to the drawers and endorsers by notice in writing, and print of even date with said protest, viz: E. R. Chew, drawer, and C. G. Johnson, Josias Gray, and Dicks, Booker & Co: those for E. R. Chew, the drawer, and C. G. Johnson, the endorser, I put into the post office, addressed to them respectively, the drawer at La Fourche interior, and C.G. Johnson at St. Francisville, Louisiana, and those for Josias Gray and Dicks Booker & Co. I delivered to them; of all which I make this record in presence of John Stringer and John Peterkin, signed G. R. Stringer, Notary Public; John Peterkin, I. Stringer.

The admission of this paper in evidence was objected to, on the ground that the said declaration was not made in conformity to the 1st section of the statute of 1821 upon that subject. Of that opinion was the court, and they rejected the evidence. The plaintiff excepted.

A great number of objections have been taken to the certificate, among others that it does not state what post office the notice was put in. Nor shew that the letter notifying the endorser was directed to the post office nearest his residence. It may be possible, these objections are entitled to considerable weight, but they go to the effect of the evidence, and have nothing to do with the legality of admitting it. The certificate if made in the form prescribed by law should have been permitted to go to the jury; what it proved was for their consideration.

We have examined the certificate here offered and on comparing it with the provisions of the statute which introduced this species of proof we can discover no objection to its form. It gives the names of the drawers and endorsers—the date of the notices—the manner in which they were sent—and it appears to have been duly recorded. This in our opinion made it admissable in evidence, tho' like other proof

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it might not perhaps have established every thing necessary to enable the party introducing it to recover. But whether it did or not was a question which could only be gone into after the evidence was before the jury.

Being therefore of opinion, the court below erred in rejecting the evidence, the cause must be remanded, and this renders it unnecessary to examine the objection taken to the judges charge to the jury.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled avoided and reversed, and it is further ordered, adjudged and decreed, that this cause be remanded for a new trial, with directions to the judge not to reject the certificate annexed to the protest of the promissory note, and it is further ordered that the appellees pay the costs of the appeal.

Pierce for the plaintiff, *Watts & Lobdell* for the defendants.

DICK & ALS vs. *MAXWELL, & ALS.*

APPEAL from the court of the sixth district.

MATTHEWS Judge delivered the opinion of

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DIXON vs. MAXWELL.

An incomplete instrument, which has not received the signature of the parties, is inadmissible in evidence.

the court. This suit is instituted against two of the acceptors of a bill of exchange by the holder thereof, under indorsement. Payment is claimed from the defendants as two of the partners of a commercial firm by which the bill is alledged to have been regularly accepted. Judgment by default, which was afterwards made final, was obtained against Wilson; and Maxwell filed an answer, containing a general denial of the facts alleged in the plaintiffs' petition. On this issue, as shewn by the record, three trials have taken place before three different juries, and verdicts rendered in every instance in favor of the plaintiffs; on the last of which, judgment was pronounced, from which the defendant Maxwell took the present appeal.

According to the point filed in this court, on the part of the appellant; two principal grounds of defence appear to be assumed. The first relates to want of property shewn in the plaintiff as holder of the bill, and improper pursuit on his part in not suing all the partners by whom it is alleged to have been accepted. The second embraces the whole merits of the case, as it affects the interest of the defendant who has appealed. It is attempted to shew that the

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acceptance was made in fraud of his rights; by connivance between the payers of the bill and the acceptors who were drawers for their private benefit, to pay a debt of their own in which the firm of Hugh B. Maxwell, and Co. had an interest.

The state of the endorsements on the bill is relied on to shew that the present plaintiff and alleged *bona fide* holder, is not the legal proprietor. The first endorsement by the payees is in blank—a full endorsement is made to the order of Augustus Guibert, which appears to have been stricken out by the present holder. This, according to the custom of merchants, he had a right to do. see Bailey, on the law of Bills of Exchange, &c. p. 68, and the cases therein referred to.

In ordinary commercial partnerships, every one of the partners is bound *in solido* for the debts of the partnership; and the debt is presumed to be contracted in the name of the partnership, when one of the partners signs in the name of the company, &c. see old c. code, p. 396, 98, art. 41. When several persons are bound in solido, or in other words, when an obligation is joint and several, the obligee may pursue all the obligors jointly, or any one of

them seperately. The state of the pleadings in the case now under consideration, exhibits a contest between the plaintiff and one of the alleged acceptors of a bill of exchange, who is bound severally with his other partners to pay the amount for which it was drawn; unless there be shewn some substantial objection to the validity of the obligation.

It is contended for the appellant that the acceptance of the bill in question created no obligation on his part, because his partners [admitting them to be such] used the name of H. B. Maxwell, and Co. to pay off their individual debt, and that the plaintiff being only a trustee for the payers of the bill, must be subjected to any defence which would be good against them; consequences seriously affecting the appellee's claim might result from this means of defence if it had been fairly put at issue by the pleadings of causes in any stage of its progress before the several juries. This was not done and we are therefore of opinion, that all the evidence offered in favor of the defendant to support this species of defence, was properly rejected by the court below. The case, if its character be determined by the petition and answer, is simply one between the endorser of a

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bill of exchange and an acceptor, and does not appear to have originated in circumstances which would authorize an enquiry into the consideration of the contract after the evidence of it has passed apparently in a fair course of trade, into the hands of a *bona fide* holder, such as the plaintiff alleges himself to be. The existence of a partnership between the appellant and the person who accepted the bill in the name of the firm, seems to have been proven to the satisfaction of three juries. It is true that the defendant offered to rebut the testimony given in support of this fact, by the exhibition of a project of partnership as contained in certain articles reduced to writing, but never signed by the party in consequence of some of the intended partners failing to comply with certain stipulations made on their part; and also to prove that the co-partnership was never carried into effect. The evidence thus offered was rejected by the judge *a quo*; and a bill of exceptions taken to the opinion by which it was so rejected.

We think the judge did not err in refusing to admit the evidence offered. The stipulations in the instrument which when completed, were to have regulated the respective interests

of the parties to the contract of partnership, being incomplete and unsettled, could in no manner affect the rights of third persons who had contracted with the firm as existing *de facto*, neither could the private acts of the partners composing the company; unless these acts were equivalent to a declaration of the non existence or dissolution of the partnership, and public notice given of these facts.

Upon a strict examination of the whole case as brought before this court, we are unable to discover any error in the proceedings or judgment of the court below.

It is therefore ordered, &c. that the judgment of the district court be affirmed with costs.

Pierce for the plaintiff, *Watts & Lobdell* for the defendant.

SWIFT vs. *WILLIAMS, & AL.*

A grant of letters testamentary, is an order that the will be executed.

APPEAL from the court of the eighth district.

MATTHEWS, J. delivered the opinion of the court. The decision of this case under its present circumstances, depends on a bill of exceptions taken to the opinion of the judge *a quo*

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by which he refused to admit in evidence to the jury, a certified copy of the will of the testator, and certificate of renewal of letters testamentary offered by the plaintiff. The copy of the will which appears to have been duly proven before the proper officers, seems to have been rejected because it contained no order to be executed.

The granting of letters testamentary to an executor after probate of a will, certainly amounts to a order, or authority to carry such will into effect. The certificate of a renewal of letters of executorship, or letters testamentary, by a successor in office to the judge who received probate of the will, shews that such authority had been previously granted. But, admitting that it does not shew the previous authority, the act of the last judge would authorise the executor to carry into effect the intentions of his testator, unless the validity of such a proceeding on the part of the judge can be impugned, as being in violation of law. The last authority was granted to the executor before the commencement of the present suit.

It is therefore ordered, &c. that the judgment of the district court be avoided, reversed and annulled. And it is further ordered, &c.

that the cause be sent back to said court to be tried, *de novo*, with instruction to the judge *a quo*, to admit in evidence the probated copy of the will and the renewed letters testamentary, or letters of executorship: and that the appellees pay the costs of this appeal.

McCaleb for the plaintiff, *Porter* for the defendants.

POYDRAS vs. *HIRLART.*

APPEAL from the court of the fourth district.

The copy of a copy of an act of mortgage, does not authorise a suit of seizure. Even when this copy makes part of the record of a suit against the mortgager, in which the third possessor intervened, if he did so to be relieved from a sequestration

MATTHEWS, J. delivered the opinion of the court. This is an hypothecary action in which the plaintiff prays for an order of seizure and sale of a certain slave described in his petition, on which he claims a right of mortgage, and seeks to enforce it on the property in the hands of the defendant, a third possessor. The court below gave judgment of non-suit against the plaintiff, from which he appealed.

The proceedings in the case were commenced under the government of the late civil code, and have been conducted in reference to the rules therein prescribed, in relation to actions of this kind. According to these rules, a plain-

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tiff who desires to have mortgaged property seized in the hands of a third possessor, must produce a copy in due form of the act of mortgage, and a judgment against the principal debtor. Old code, 469, art. 43.

In the present suit, the plaintiff produces a record of the proceedings and judgment, by him obtained against the principal debtor; and among these proceedings is found a copy of the instrument of mortgage as transcribed by the clerk of the court below, in which said proceedings were carried on. This is clearly not a copy in due form as required by the code. It is only the copy of a copy, and consequently not directly certified by the officer entrusted to keep the registry of mortgages.

But to supply this defect, the counsel for the appellant insists on the intervention of the present defendant, in the suit commenced and carried on against the principal debtor. The object and the sole object of that intervention as shewn by the record of the proceeding which took place in that case, was to obtain relief by the intervening party against a sequestration, by virtue of which his slave had been seized. We believe it to be a circumstance which does not change his situation from that of ordinary

third possessors of mortgaged property. The plaintiff failed to make out his case, by not producing a copy of the mortgage in due form, and the judge *a quo* acted correctly in nonsuiting him.

It is therefore ordered, &c. that the judgment of the district court be affirmed with costs.

Cuvillier for the plaintiff, *Eustis* for the defendant.

POYDRAS DELALANDE vs. *HIRIART.*

APPEAL from the fourth judicial district.

MATTHEWS, J. delivered the opinion of the court. A rehearing has been granted in this case, in consequence of a supposed error or mistake of the court in its former judgment, in considering the matters in dispute between the parties, as under the government of the laws which were in force previous to the promulgation of the Lou: Code.

The action is hypothecary and directed against a third possessor since the new code went into operation; but seems to have been conducted in reference to the provisions of our

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former laws, which required that a judgment should be obtained against the principal debtor before proceedings could regularly take place, to cause mortgaged property to be sold or delivered up by a third possessor, or compel him to pay the amount for which it might be hypothecated. Under the government of those laws, a judgment was obtained against the original debtor, and was made in part the basis of the present suit, altho' commenced since the promulgation of the Lou: code. These circumstances leave it, perhaps, doubtful as to the law which must govern the case. The art. 3364, of the new code, seems to dispense with the necessity of obtaining judgment against the debtor; and allows a mortgagee creditor to pursue the third possessor directly, thirty days after demand of payment. The articles 69 & 70 of the code of practice are in conformity with that of the civil code just cited. This alteration in the law appears to be intended for the benefit of hypothecary creditors, and this benefit or advantage they may legally forego, and resort to the former mode of pursuing property in the hands of a possessor. In the present case the creditor was obliged to commence in pursuance of the rule established by the code on the

subject of hypothecary actions; as he instituted the suit against this debtor before the alteration introduced by the new code & code of practice. And we are inclined to think, that the regulations under which the proceedings originated ought to be followed throughout.

But should all the advantages accorded by the last law on the subject, be allowed to the plaintiff and appellant, we do not believe that he can profit by them. This law in dispensing with the evidence of a judgment against an hypothecary debtor, in order that the creditor may pursue directly a third possessor, cannot on any reasonable interpretation be supposed to authorise such pursuit, and recovery thereon, without producing a copy of his act of mortgage made in due form.

Cuvillier for the plaintiff, *Eustis* for the defendant.

MITCHEL & AL. vs. WHITE & AL.

When there is neither statement of facts, bill of exceptions, &c. the judgment is never disturbed, if any duly admitted evidence would support it.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiffs, as

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attorney at law, clerk and notary were employed by the defendants, White and Gainie, syndics of the creditors of the defendant, L'Eiglise, in affairs relating to the insolvents estate, in their professional capacities, and their respective compnsaetions, to which they thereby severally entitled, are unpaid; that White and Gaienie, after receiving the proceeds of the estate surrendered—resigned their syndicships, and L'Eglise was appointed sole syndic of his creditors. That neither White, Gaienie or L'Eglise ever presented a tableau—the prayer is that they be cited to answer the petition present a tableau, placing them the plaintiffs for their respective claims, or that judgment be given against them therefor.

L'Eglise pleaded the general issue and want of funds.

White neglected to answer, and judgment by default was taken against him.

Gainie pleaded that the plaintiffs could not cumulate their claims in a joint suit.

The plaintiffs were nonsuited and they appealed.

There is no statement of facts, no bill of exceptions, &c. so that the appellants rely on error apparent on the face of the record.

In such a case the judgment appealed from is never disturbed, if any evidence introduced might support it, or if the pleadings justify it.

As to the defendants Gainie and White, the petition admits they are no longer syndics, and that there is a new syndic duly appointed in their stead. If so, to this syndic they have, or are bound to account for that part of the insolvent's estate which came to their hands, and are not suable by individual creditors.

As to the defendant L'Eglise, he has pleaded the general issue, and the plaintiffs do not appear to have introduced any evidence.

In this state of the case, the plaintiffs were correctly nonsuited, and it is useless for us to give any opinion on the grounds taken by the inferior judge.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

MORGAN & AL. vs: *THEIR CREDITORS.*

Where trustees are appointed in a country governed by the common law, to receive in-

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court.

Chandler Price, the obligee of a bond execu-

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terest on a bond & pay it over to a *cestuy que trust*. and the obligor fails; the trustees have authority to lend the money out to others.

t d by the late Benjamin Morgan, due the first day of January, 1824, and bearing interest at the rate of six per cent. payable annually, by deed executed the 20th of September, 1825, at Philadelphia, in the state of Pennsylvania, declared "that in consideration of natural love and affection to my daughter Sarah Price Rose, I assign said bond to William E. Hulings and Joseph Reed; and in case of the death of either, or any other person to be appointed as hereafter mentioned, then to such person, and the survivor, as he the survivor shall appoint; *in trust,* for the sole and separate use of my said daughter, Sarah Price Rose; the interest to be paid to her during her life time, and her receipt alone to be sufficient, and on her death to such person as she, by any paper in the nature of a will, shall nominate," &c. &c.

Since the creation of this trust, an event, most probably not anticipated at the time it was made, has occurred, namely, the failure of the obligor. By the laws of this country, the note becomes due and demandable at once, and the trustees named in the deed already set out, have obtained payment of it as they state, by a transaction of which the following instrument is the evidence:

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"For and in consideration of the sum of sixteen thousand eight hundred and thirty dollars and five cents, the principal and interest of the bond, of which the within is a copy, and the original now in possession of the syndics of the estate of Benjamin Morgan; received in the note of Thomas A. Morgan, secured by a mortgage from him on the premises, late the estate of Benjamin Morgan deceased, purchased by the said Thomas A. Morgan from the syndics thereof, which said note is accepted by us in full payment and entire satisfaction of this bond; we do hereby assign, transfer, and set over unto the said Thomas A. Morgan, the said bond, and all the monies due, and to become due, thereon."

At the foot of this instrument is one executed by the person for whose benefit the trust was created, in the following words: "I acknowledge to have received of Thomas A. Morgan, the full amount of interest due on the bond of which the within is a copy, and the original now in the possession of the syndics of Benjamin Morgan's estate; and hereby assign over to him all my interest in the same."

The appellee took a rule on the appellants, in the district court, requiring them to give up

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to him the note of the insolvent already mentioned, and three others similarly circumstanced. They objected to do so, and after argument the court decided that the appellee had a right to receive them. From this judgment, the syndics have appealed.

The only question presented to the court, is whether this transfer, by the trustees to the appelee, of the note, is a legal exercise of the powers vested in them by the deed of trust.

Two objections have been suggested to its correctness. *First*—that by the terms of the deed, the power of the trustees is limited to receiving the interest due on the bond, and no authority is conferred on them to collect the principal. *Second*—that if they have the power to collect the principal, they have no authority to exchange the notes in the insolvent's estate for those of any other individual.

As these objections are both founded on the idea of there being a necessity for a strict and literal performance of the trust, they may be considered together.

As the deed was executed in a country governed by the common law, and the assignment to the appellant was made there, the case must be examined in relation to that system of juris-

prudence. As we are not familiar with it, we have had some diffidence in coming to a conclusion.

If the effect of the assignment was considered under the strict rules of the common law, there could be no question as to its validity. for the legal title is vested in the trustees, and they have passed it away. But the severity of that system has compelled the countries governed by it, to throw the whole controul and jurisdiction of trust estates into their courts of equity. These courts, with some aid from the legislature, have established, in relation to this subject, a system of rational jurisprudence by which trusts are made to answer all the beneficial objects society can receive from them. *7 Bac. ab.* 136. *2 Black Com.* 337.

The first and most important of their rules is to give effect to the intention of the creator of the trust, if it be possible. To accomplish this they look more to a substantial, than to a strict or formal performance of the duty imposed on the trustee. If an unforeseen event, which the party did not contemplate, arises, they will interfere so as to carry into effect the general intention. And it seems, though the rule is not clearly established, that whatever a trustee

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would be compelled to do by suit, he may do without it. 2 *Fonblanque's equity*, 13, 2 *chap.* 7, § 2. *Ibid*, *chap.* 8, § 4. 3 *Bro. Ch. Rep.* 60. 2 *Vernon*, 137. 1 *Bunbury* 136. 2 *Freeman* 42. 2 *Ch. Cas.* 16. *Sugden on Powers*, 445 & 446. 2 *Eq. cases abr.* 668. 6 *Vesey, jr.* 793.

The application of these principles to a great variety of cases, may be found in the English books. Those most analogous to that before the court, are collected in *Bacon's Abridgment, vol.* 7, 183; and the rule extracted from them is, "that where a trustee sells out stock contrary to the trust, the *cestui que trust* may elect to have the stock restored, or the produce of it paid. But if a trustee for the benefit of the trust estate, sells out of one fund and invests the produce in another, or transfers the money from one real security to another, the property continues unaltered, and he shall not be chargeable.

In the case before the court, the intention of the creator of the trust was, that his daughter should receive the interest on a certain sum of money, for the period therein mentioned, and at the expiration of it the principal. An unforeseen event has rendered it impossible for

the interest to be collected in the manner indicated in the deed. The duty of the trustees, therefore, looking to the general intent, is, to provide a remedy against the occurrence, by putting the money out at interest somewhere else. This they could be compelled to do by the *cestuy que trust*, and we have little doubt they may do so without compulsion. In exercising this power, the law requires a sound and honest discretion; and the extent to which they have used it here, seems as well sanctioned by authority, as it is by the reason of the thing. Whether they discharge the duty now devolved on them, by collecting the money from the insolvent's estate, and then lending it out, or by exchanging the notes of the bankrupt for those of another man, against whose solvency, and ultimate responsibility, no doubt has been expressed, is a difference in the mode, but not in the end.

But, admitting the principles on which this opinion has been just expressed, are erroneous, or that we have drawn unsound conclusions from them, the approbation of the *cestuy que trust* clearly renders the transaction valid. She is not shewn to be under any disability arising from minority or other cause; and

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though at law she has neither *jus in re*, nor *jus ad rem*, yet in equity she has both: she has *jus habendi*, and *jus disponendi*, and her assent cures any defect that might otherwise exist in the power the trustees have exercised. 7 *Bac. ab.* 180, 185. 3 *Atk.* 444.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Eustis for the plaintiffs—*Hennen* for the defendants.

WATSON & AL. vs. PIERCE.

A court cannot give judgment by default, on a petition addressed to another court. Nor permit the petition to be amended.

APPEAL from the court of the third district.

MATTHEWS J. delivered the opinion of the court. In this case, a petition addressed to the district court of the parish of West Feliciana was filed in the office of the clerk of East Baton Rouge. Copies of the petition and citation were served on the defendant who was a resident of the latter parish, and is stated to be such in the petition. No appearance was put in by the defendant, nor answer filed, and the plaintiff moved for judgment by default. The court refused to grant it, because it had no ju-

risdiction of the case; application was then made to amend the petition by striking out the word *West Feliciana*, and inserting the words *East Baton Rouge*, and also for leave to change the assertion in respect to the residence of the plaintiffs, who were styled "of the city of Philadelphia and state of Louisiana," by erasing the words state of Louisiana. The court refused leave to do so, and the petitioners excepted.

We think the judge below did not err. His refusal to give judgment by default on a petition addressed to another tribunal is so clearly correct, that it requires no observation from us to shew it so. His rejecting the application to amend is sustainable on the obvious reason that there was nothing before him to amend by. The case was not legally before his court, because it was addressed to another tribunal, and the error of the clerk in filing it and issuing citation, could not enable him to take cognizance of it. The judge of west Feliciana was the only person who could have authorised amendments to this petition. That which was offered under the name of an amendment in the court of east Baton Rouge, was the making a new petition by changing the tribunal, and there

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was nothing before that court to which such an amendment could attach.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts & Lobdell for plaintiffs, *Duncan* for defendant.

HAWKINS vs. *VANWICKLE.*

Evidence, legal in itself, cannot be rejected, because something more may be necessary to make out the case.

APPEAL from the court of the fourth district

PORTER. J. delivered the opinion of the court. The plaintiff claims from the defendant a slave and other property, which the defendant had taken into his possession, and prays that he may be enjoined from selling them under a writ of *fieri facias* which he had issued against one John M. Walker.

The defendant among other objections which he set out in his answer to the demand of the petitioner, pleaded, that she was black and a slave, and as such was incapable of bringing suit.

On the trial of the cause, the plaintiff offered a deed of emancipation passed in Cincinnati, state of Ohio, to prove her emancipation: its

introduction was objected to on the ground that previous to reading it, it was incumbent on her to prove the formalities (if any such there were) required by the laws of Ohio in emancipating slaves. The court sustained this objection, and rejected the instrument offered. There was judgment against the plaintiff, and she appealed.

This case has been submitted without argument. It is clear to us the court below erred. The deed should have been admitted for what it was worth. Where the evidence in a cause consists of a variety of facts, the tribunal before which it is tried, has certainly the power to prescribe that such order shall be pursued in their introduction, as will best tend to present the case in a clear and unembarrassed manner. But the exercise of this power cannot be construed to extend so far as to authorise the rejection of evidence legal in itself, because something more may be supposed necessary to make out the case. That is an opinion which can only be expressed when the merits are gone into. If the case had been that the party was prepared to shew by the laws of Ohio, that no previous steps were necessary, the most natural order was that resorted to, first to shew the

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act of emancipation, and then to prove that it was valid by the laws of the country where it was executed. But the whole proceeding was in fact irregular. This was not the case of a slave sueing for her freedom, but of a woman in the enjoyment of it, sueing another for property which she alleged belonged to her. In such case the burthen of proving the fact of slavery was on the party making the allegation. By a law of the Partidas where a man claims another who is in the actual possession of liberty as his slave, the necessity of proving him such is thrown on the claimant—*a fortiori*, where the question arises collaterally with a third party; and the former master by his not interfering in the suit, furnishes a violent presumption that the state and condition of the plaintiff is that which she represents it to be. *Partidas* 3, *Tit.* 15, *Law.* 5.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, and it is further ordered, adjudged and decreed, that the cause be remanded for a new trial, with directions to the judge not to reject the act of emancipation set forth in the bill of exceptions, because the plaintiff does not prove a compliance with the

formalities (if any) required by the laws of the state of Ohio in emancipating slaves: the appellee paying the costs of this appeal.

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McCaleb for the plaintiff.

CASSEDY vs. LOUISIANA STATE INSURANCE COMPANY.

A demand of payment for a total loss, amounts to an abandonment.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is an action on a policy of insurance: there have been two verdicts in favour of the plaintiff in the court below. The first was set aside in this court, and the cause remanded in consequence of an error in the charge of the judge. No objection of that kind is made now, and the cause stands before us on its merits.

There is no evidence whatever of a formal abandonment, but there is proof that a person holding the policy called on the defendants, and made a demand *as for a total loss*; that they asked him if the policy was endorsed to him, or if he had a power of attorney, and that on his answering in the negative, they stated, that the matter must lie over until he obtained

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an authority, and advised him to write for it. The witness was the person by whom the insurance had been effected.

Whether a simple demand for a total loss amounts to an abandonment or not, is a question which cannot yet be considered as settled. Mr. Phillips who has collected the cases in his late treatise on insurance, shews, that it has been decided both affirmatively and negatively in England. The doctrine appears however well understood, that no particular form of abandonment is necessary, and under this principle we are of opinion that a demand of payment as for a total loss amounts to it. The less the transactions of merchants, and all other classes of society are fettered by forms and technical rules, the better are the ends of justice promoted, because there is great difficulty in getting the world to understand and follow them. Courts therefore act correctly, where positive regulations do not prevent them, in looking at the intention of the parties and their understanding, rather than to forms. A demand for a total loss, if not necessarily, at least most strongly implies the doing of that on the part of him making the demand, without which it could not be rightfully made. Payment

made on it would certainly vest the right of the insurer in the insured. It therefore naturally follows, that in demanding the payment, the insured avowed his intention of divesting himself of his right to the property and transmitting it to the insurers. *Phillips on Ins.* 447, 3 *Moore*, 115, 12 *East*, 488.

An objection has been taken to the want of authority in the agent to make the demand. But it appears he was the same person who effected the insurance, and as such was authorised to abandon, and adjust the loss, more particularly as he was the holder of the policy of insurance. *Phillips on Ins.* 519, 1 *Campbell* 43, 6 *Cranch* 272.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff, *Eustis* for the defendants.

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MELLON vs. LOUISIANA STATE INSURANCE COMPANY.

Whether an abandonment was made in due time, is a proper question to be acted on by the jury.

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court. This is an action on a policy of insurance executed by the defendants on goods shipped by the plaintiff on board the schooner Samuel Smith, on a voyage from New-Orleans to *Port au Prince*. The vessel encountered a severe gale of wind on her passage, and was obliged to put into Savannah. A survey was then held on her, and in consequence of the damage she had sustained, she was condemned—the voyage was broken up, and the cargo sold. The plaintiff claims as for a total loss.

The cause has been submitted to two juries who have both found for the plaintiff.

The fact of the voyage being broken up, and the propriety of selling the articles insured, have not been contested. The principal, we may almost say, the only question in the cause is, whether there was such an abandonment of the insured's interest in the property saved as will enable him to recover as for a total loss.

The cargo was sold in Savannah on the 20th June, 1825. On the 4th or 5th August, the agent of the plaintiff made a demand of the de-

fendants of payment for a total loss. On the 3d of November, the plaintiff, who had been a resident of Philadelphia for some months previous, made a formal abandonment.

A question has been made, whether a demand for a total loss amounts to an abandonment. But in this case, a decision of that point is unnecessary, for there was a re ular abandonment. It is true it has been contended that abandonment was made too late. But whether it was or not, or in other words, whether it was made in a reasonable time, was a question of fact to be decided by the jury under all the circumstances of the case; and we do not see any thing which shews such error in the conclusion they came to as to induce us to send the cause back for a new trial.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts and *Lobdell* for the plaintiff, *Eustis* for the defendant.

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BROWN vs. *THOMPSON.*

In sales made before the promulgation of the new code, the rights of the parties are to be regulated by the provisions of the former code.

APPEAL from the court of the third district

MARTIN, J. delivered the opinion of the court. The payment of the balance of the price of a tract of land, sold by the plaintiff to the defendant, was resisted on the ground of a want of title in the former; and it is further urged, that the latter is actually disturbed, suit having been brought against him in his capacity of curator to the estate of Cooke, one of the joint purchasers of King and Hacket, of a tract of land, part of which was sold by King to the plaintiff, and by the plaintiff to the defendant. There was judgment against the latter, and he appealed.

As the sale to the defendant took place before the adoption of the new Civil Code, his rights under it, and those of his vendors, cannot be affected by any provision peculiar to the new code; it follows, therefore, that a danger of eviction does not authorise the vendee to retain the price, whilst there is no disturbance 7 *Martin*, 223, *vol.* 3; 220, *Abat* vs. *Cast. id.* 480, *Excisor* vs. *Weiss*, *id.* 352, *Gardere* vs. *Weiss.*

The new code adds to the contract of sale a new clause, which prevents the recovery of the

price, in a case in which it was legally demandable. It imposes the obligation of giving security for returning it; an obligation, in every instance very burdensome, and in many impossible; and the case of the vendor is rendered still harder by his being unable to recover back his property, while he cannot claim the price.

The suit against the defendant in his capacity of curator to the estate of Cooke, cannot affect his individual property, nor the rights of King, the joint owner of Cooke.

Interest was properly allowed on the price of the land.

It is therefore ordered, &c. that the judgment of the district court be affirmed with costs.

Morse for the defendant.